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No. 80-1183

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSISSIPPI, APPELLANT

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL, and UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the district court properly disqualified appellant's counsel because of his substantial involvement in this matter during his service as a government attorney.

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Under this Court's Rule 16, the Attorney General and the United States move to affirm the disqualification order of the district court.

OPINION BELOW

The opinion of the district court (J.S. App. A-1 to A-4) is not reported.

JURISDICTION

The order of the district court was entered on September 29, 1980. The notice of appeal was filed on

October 28, 1980. The appeal was docketed on January 14, 1981. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c. For further discussion of the jurisdictional questions presented by this appeal, see note 2, *infra*.

STATEMENT

In December 1979, the State of Mississippi filed this suit in the United States District Court for the District of Columbia, seeking a declaratory judgment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, that a change in voting practices, recently enacted by the Mississippi legislature, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The defendants in the case, the United States and the Attorney General, moved to disqualify Mississippi's attorney, Jerris Leonard, because of his substantial involvement, during his tenure as Assistant Attorney General for the Civil Rights Division of the Department of Justice, in reviewing an identical change in voting practices enacted by the Mississippi legislature in 1970. The three-judge district court granted the government's motion (J.S. App. A-1 to A-4), and Mississippi appealed directly to this Court.

1. Under current Mississippi law, the same law that has governed Mississippi elections for the last 75 years, candidates for public office may qualify to run in the general election either by winning a party primary or as independents. In 1970, the Mississippi legislature enacted bills that would have replaced this system with a so-called "open primary" method of selecting candidates for the general election. See House Bills 362 and 363 (approved April 6, 1970).

Under the new law, all candidates for an office would run in a single primary. If one candidate received a majority of the vote, his name would be the only one placed on the ballot for the general election. If no candidate received a majority of the primary vote, the two candidates who received the highest number of votes would run against each other in the general election.

Because Mississippi is subject to Section 5 of the Voting Rights Act, and because the 1970 "open primary" law undisputedly would have effected a change in a "standard, practice, or procedure with respect to voting," the State submitted House Bills 362 and 363 to the Attorney General for "preclearance" under Section 5. Jerris Leonard, Mississippi's counsel in the present litigation, was then Assistant Attorney General for the Civil Rights Division of the Department of Justice. In that capacity, he reviewed Mississippi's submission under Section 5, pursuant to a delegation of authority from the Attorney General. See 28 C.F.R. 0.50. Leonard concluded that he could not make a final decision regarding preclearance within the 60-day period provided by the Voting Rights Act (U.S. Exh. S). Subsequently, in response to a challenge to the implementation of House Bills 362 and 363, the United States District Court for the Southern District of Mississippi held that the laws had not been precleared in accordance with Section 5 and therefore could not be enforced. *Evers* v. *State Board of Election Commissioners*, 327 F. Supp. 640 (1971), appeal dismissed, 405 U.S. 1001 (1972).

In 1979, the Mississippi legislature again attempted to substitute an open primary system for the existing method of selecting candidates for general elections in the State. The legislature enacted Senate Bill 2802,

which provided for an open primary system indistinguishable from the one that would have been created by House Bills 362 and 363 nine years earlier. Mississippi submitted the new law to the Attorney General for preclearance in accordance with Section 5 of the Voting Rights Act. In June 1979, Assistant Attorney General Drew S. Days, III, interposed a timely objection on the ground that the open primary system would " 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " U.S. Exh. JJ, quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Thereafter, Mississippi filed this lawsuit.

2. The government moved to disqualify Leonard and his firm from representing the State, on the ground that Mississippi's 1970 submission to the Attorney General involved the same proposed change in voting procedures as Senate Bill 2802 and that therefore counsel's substantial involvement in reviewing the 1970 submission in his capacity as Assistant Attorney General precluded him from acting as an attorney for the State in this matter. After a hearing, the district court granted the government's motion (J.S. App. A-1 to A-5). The court observed that, under Canon 9 of the American Bar Association's Code of Professional Responsibility, lawyers "should avoid even the appearance of professional impropriety." In addition, the court pointed to Disciplinary Rule 9-101(B) of the ABA's Code, which states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee" (J.S. App. A-2). The court found that, as Assistant Attorney General, Leonard had been "intimately involved" in the Justice Department's review of Mississippi's 1970 submission

under Section 5 of the Voting Rights Act (J.S. App. A-3). Because the 1970 and 1979 state statutes were both designed to substitute the same open primary system for the existing party primary system, the court held that the state laws "must be considered the same matter" for purposes of the government's disqualification motion (*id.* at A-3 to A-4). Accordingly, the court disqualified Leonard and the members of his firm from representing Mississippi in this litigation.

ARGUMENT

Under 18 U.S.C. 207(a), a former government attorney who, in the course of his government employment, "participated personally and substantially" in any controversy, investigation, judicial proceeding, ruling request, or "other particular matter" is thereafter prohibited from representing any other party in connection with that matter. Similar prohibitions are contained in Justice Department regulations. 28 C.F.R. 45.735-7; 45 Fed. Reg. 7409 (1980) (to be codified at 28 C.F.R. 45.737.5). Disciplinary Rule 9-101(B) of the ABA's Code of Professional Responsibility imposes a like restriction on former government attorneys. The United States District Court for the District of Columbia has adopted this Rule as part of its Code of Professional Responsibility. See Local Rule 4-3(IV)(b), adopting the Code previously adopted by the District of Columbia Court of Appeals, which is the ABA Code with certain amendments, none of which involve Rule 9-101(B).

Presumably because the conflict-of-interest standards thus set forth in statute, regulations, and professional code are consistent and well known, the disagreement between the parties in this litigation is narrow. Mississippi does not challenge the district court's power to disqualify a former government at-

torney from representing a client in a "matter" in which he had "substantial responsibility" when employed by the government. Nor does the State take issue with the court's finding that counsel participated personally and substantially in the Justice Department's review of the 1970 legislation that would have established an open primary system in Mississippi.[1] Rather, the primary focus of the State's attack is the district court's conclusion that the 1979 law, which concededly would establish the identical open primary system, is the same "matter" as the 1970 legislation, for purposes of the court's ruling on the government's disqualification motion. The district court's decision in this regard is clearly correct, does not conflict with any other federal court's interpretation of the phrase "particular matter" as used in 18 U.S.C. 207 and Justice Department regulations, and turns entirely on the unusual factual sequence presented here. Further briefing and argument would not provide additional illumination on the similarity of the 1970 and 1979 state legislation, and, accordingly, we believe that summary affirmance of the district court's disqualification order is the appropriate disposition of Mississippi's appeal.[2]

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[1] Mississippi could hardly question this finding, in light of the evidence in the record showing that, as Assistant Attorney General, Leonard rejected his staff's recommendation to interpose an objection to the 1970 legislation and instead responded to the State's submission by saying that he could not make any determination regarding the validity of the proposed voting changes within the 60-day period allowed by Section 5 of the Voting Rights Act. Compare U.S. Exhs. M, O, and Q with U.S. Exh. S.

[2] We agree that the Court has jurisdiction over the appeal. We think, first, that the disqualification order should be immediately appealable to some court under the "collateral

The district court ruled that Mississippi's 1970 and 1979 submissions to the Attorney General in-

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order" doctrine enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). If Mississippi cannot appeal now, there is a significant probability that appellate review of the disqualification question will never be available. Assuming that Mississippi is unsuccessful in its suit under Section 5 of the Voting Rights Act, it is highly unlikely that this Court would reverse the three-judge district court's holding on the merits and remand for new proceedings, solely on the ground that the State should have been permitted to retain Leonard as its counsel. (In this regard, the disqualification order here may be different from a similar order entered against a defendant in a criminal case. If a defendant's attorney is improperly disqualified and the defendant is subsequently convicted, reversal of the conviction and remand for a new trial may be sufficient to protect the defendant's interest in being represented by the counsel of his choice. The potential distinctions between criminal cases and other litigation in connection with attorney disqualification issues are discussed at greater length in the Brief for the United States as Amicus Curiae in *Firestone Tire & Rubber Company* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), at 13-18, 25-26.) At least in civil cases, the courts of appeals agree that orders granting motions to disqualify counsel are immediately appealable. See, *e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), vacated and remanded on other grounds, No. 80-431 (Jan. 19, 1981); *General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979).

Assuming that appeal at this juncture is appropriate, the remaining question is whether such an appeal should be taken to this Court or to the court of appeals. Section 5 of the Voting Rights Act states simply that "any appeal shall lie to the Supreme Court." The plain language of the statute thus seems to support this Court's appellate jurisdiction in the present situation, as well as after a decision on the merits. Conceivably, the words of Section 5 could be construed to comprehend only appeals from final judgments, but, as Mississippi observes (J.S. 7-9), such a construction would seem to run counter to this Court's reasoning in *NAACP* v. *New York*, 413 U.S. 345 (1973). Although the entire controversy

volved the same "matter" because they both contemplated the substitution of the same open primary election system for the State's existing party primary system. The issue before the Attorney General in both 1970 and 1979, and the issue in this litigation, is whether the open primary system has the purpose or will have the effect of "denying or abridging the right to vote on account of race or color," within the meaning of Section 5 of the Voting Rights Act. Jerris Leonard was substantially involved in the Justice Department's consideration of that matter in 1970, and his involvement then should preclude his representation of Mississippi now.

The State contends (J.S. 15, 17), however, that the 1979 legislation is a different "matter" because it was "passed by a different legislature" and signed by a different governor, "in a state that has changed socially, politically, demographically, and economically since 1970." The argument is unpersuasive. Mississippi's statutory proposal is the item subject to review under Section 5, and Mississippi's statutory proposal has not changed. The identities of the state legislators who supported the proposal are irrelevant, at least to the question of effect. So is the identity of the state executive officer who approved the legislation. The allegedly changed circumstances in the State may have some effect on the probability that the open primary system will operate to deny or abridge the right to vote on account of race or color, but it does not alter the nature of the controversy.

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in *NAACP* had ostensibly been resolved by the district court before this Court heard the prospective intervenor's appeal from the denial of its motion to intervene, the Court did not suggest that its appellate jurisdiction depended on the existence of a final judgment by the district court. For these reasons, we believe that Mississippi has properly appealed the district court's disqualification order directly to this Court.

Just as the unavailability of a key witness might affect the outcome of a criminal trial, so shifts in a State's racial composition might affect the validity of a particular voting change under Section 5. But, for purposes of attorney disqualification, the "matters" would remain the same. The prosecutor at a defendant's first trial could not be the defense attorney at a retrial following appeal, even if the evidence had substantially changed in the interim. Likewise, a government attorney who has once reviewed a particular submission under Section 5 should not be permitted later to defend an essentially identical submission, merely because some of the factors relevant to the matter's resolution may have changed with time. See *General Motors Corporation* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974). Although the district court will, of course, consider current conditions in its evaluation of the 1979 submission, conditions existing in Mississippi before 1970 remain relevant to the court's decision under Section 5. In all likelihood, therefore, the present litigation will involve many of the same facts reviewed in 1970.

Mississippi also asserts (J.S. 19-20) that an attorney should not be disqualified in the absence of some showing that his participation will "taint" the judicial proceeding involved. But it is the adverse effect on public confidence, rather than on particular litigation, that courts have found to justify disqualification of a former government lawyer in these circumstances. Disqualification is necessary to ensure against even the appearance that attorneys, while working for the government, may conduct their official business with an eye to future private employment on the same case or matter.[8]

[8] Mississippi emphasizes (J.S. 19) that, in his capacity as Assistant Attorney General, counsel neither approved nor dis-

Accordingly, where the personal disqualification of a former government attorney is at stake, no actual effect on an upcoming trial need be proved as a prerequisite for judicial intervention. *General Motors Corporation* v. *City of New York, supra,* 501 F.2d at 649. See also Formal Opinion 342, 62 A.B.A.J. 517 (1975).[4]

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approved the State's 1970 submission. For this reason, the State argues, there is no prior government action that counsel might be asked to " 'uphold or upset' " as a private attorney. But neither 18 U.S.C. 207, nor Justice Department regulations, nor the ABA's Code of Professional Responsibility refers only to government attorneys who have made a formal decision on a matter. Rather, Section 207 refers to attorneys who have "participated personally and substantially * * * through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise * * *." See also 28 C.F.R. 45.735.7; 45 Fed. Reg. 7409 (1980). The ABA Code refers to attorneys who have had "substantial responsibility" in a matter while serving as government employees. In short, formal action on behalf of the government is not a prerequisite for the applicability of the restrictions on former government attorneys' practice that are at issue here.

[4] In *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d Cir. 1980) (en banc), vacated on other grounds, No. 80-431 (Jan. 19, 1981), on which Mississippi relies (J.S. 20), the court of appeals affirmed an order disqualifying a former government attorney. The discussion of "taint" appears in the context of the court's consideration of the question whether a screen could be created between the attorney and other members of his firm so that the firm could continue to represent its client. 625 F.2d at 445-446. Mississippi now represents (J.S. 24 n. 29) that its attorney has offered to screen himself from the other members of his firm, who would continue to handle the Section 5 litigation following Leonard's disqualification. The State has not shown that an effective screen can be erected, and, more important for present purposes, it has not sought reversal of the district court's disqualification order on this ground. Although screening is undoubtedly a useful tool in appropriate cases, counsel here has already partici-

Finally, Mississippi argues (J.S. 21-23) that the government, by permitting Leonard to represent Mississippi in other litigation involving the state's voting practices, has waived its right now to seek his disqualification. The State contends (J.S. 21) that the waiver occurred when the United States failed to object to counsel's participation in *Connor* v. *Finch*, 431 U.S. 407 (1977), and in *Mississippi* v. *United States*, 490 F. Supp. 569 (D. D.C. 1979), aff'd, 444 U.S. 1050 (1980). However, neither of those cases involved the proposed adoption of an open primary system; they concerned the legality of court-ordered and legislative reapportionments of the Mississippi legislature. Those reapportionments did not involve matters in which Leonard had participated personally and substantially as Assistant Attorney General. The rule applied by the district court in this case is a narrow one and certainly would not operate as a total ban against counsel's representation of Mississippi in voting litigation.

In any event, a party's failure to seek disqualification in one lawsuit cannot justify the improper participation of a former government attorney in a later

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pated substantially in the preparation and conduct of Mississippi's case.

Neither *Board of Education* v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979), nor *Society For Good Will To Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 722 (E.D.N.Y. 1979), on which the State also relies (J.S. 19-20), involves disqualification of a former government attorney. Indeed, the district court in *Society For Good Will* specifically acknowledged (466 F. Supp. at 725) that "where a former government attorney seeks to represent private clients on matters for which he or she had responsibility while in public employ * * * dicta suggest that appearance of impropriety alone may sometimes result in attorney disqualification."

case. As one court of appeals has written, "disqualification is in the public interest [and therefore] the court cannot act contrary to that interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility." *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973). See also *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 351 n. 6 (S.D.N.Y. 1955).

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

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